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No. 97-1704

In the
Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,
Petitioners

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

1. Rule 23(a) Certification. Respondents concede that, as this Court held in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 2249 (1997), the certification inquiry under Rule 23(a) must focus on the legal and factual questions that qualify each class member's case as a justiciable controversy, questions that must preexist any settlement. Br. of Class Counsel (Class Br.) 9. Yet as the Petition showed, Pet. 7, 10-13, the courts below applied a conflicting rule for class certification. The respondents accuse us of "unfairly tinkering" with the Fifth Circuit's opinion to conjure what they admit would be an issue worthy of plenary review. Br. of Continental Cas. Co., *et al.* (Ins.Br.) 15. But they simply refuse to take the Fifth Circuit at its word, and ignore that court's own, explicit explanation for its decision. The court of appeals said that the district court did not err by considering "the evidence adduced at the fairness hearing in making findings under Rule 23(a)." App. 54a. The court said that the common and typical "questions of law or fact" may be "derived from the settlement rather than from the [plaintiffs'] complaint." App. 56a-57a. And the court expressly affirmed class certification on the basis of "issues [held] in common under the settlement." App. 57a. Petitioners did not make those words up. Indeed, this Court read the Fifth Circuit's decision precisely the same way in *Amchem*, which was the basis for the Court's GVR order. *See* Pet. 11-12. The Fifth Circuit's holding on remand that "nothing in the *Amchem* opinion ... changes our prior decision" (App. 2a) is nothing less than a refusal to apply the law laid down by this Court and warrants summary reversal.

But there is ample reason to give this case plenary review because the corruption of Rule 23 wrought by the decision below is even more subversive than that condemned in *Amchem*. The Respondents repeatedly tout the "legal and factual questions presented by the insurance disputes" between Fibreboard and the Insurers and insist that it was by "reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the 'commonality' and 'typicality' requirements of Rule 23(a)." Class Br. 9 (original emphasis); *see also* Ins.Br. 2, 8, 9; Fibre Br. 20, 26.

For once everyone is in total agreement. But the problem is that the legal and factual questions raised in the insurance coverage litigation are presented *not* in *this* case, but in two *other cases* — the state court coverage litigation in California and the *Rudd* class action brought by the Insurers to lock in the Trilateral Settlement.

Respondents note that the plaintiff class's stake as potential beneficiaries of Fibreboard's liability insurance policies was "referred to in the complaint" in this case, Fibre Br. 20 (citing App. 556a-559a) — but those "references" were mere background, not the requisite "'claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit.'" *Amchem*, 117 S.Ct. at 2249 n.18. The complaint's actual *claims*, App. 560a-564a, were *personal injury tort claims brought against Fibreboard*, not insurance coverage third-party beneficiary claims brought against the Insurers. Thus the legal issues that, according to the Respondents and the court below, supposedly furnish the requisite commonality and typicality under Rule 23(a) for this class certification involve *not* the claims alleged in this class action, *but the claims in another lawsuit.*

To be sure, the class wanted Fibreboard to win its coverage dispute. And, to help Fibreboard do so, perhaps, as Class Counsel now suggest, Class Br. 9, the class could have intervened in the insurance coverage case (on Fibreboard's side of the docket) in California state court. And, following any settlement of the coverage case, perhaps the plaintiff class (rather than the Insurers themselves, as actually happened) could have instituted its own *Rudd*-style class action seeking a declaration of the plaintiffs' rights under those policies and any settlement thereof.[1] But none of that speaks to the decision of the courts below in certifying *this* class action, which pleads (and releases) personal injury tort claims against Fibreboard.[2] A commonly held interest as contingent third-party beneficiaries in the settlement of an insurance coverage dispute being litigated in a

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[1] As Respondents admit, Fibre Br. 17, the coverage dispute was resolved in the *Rudd* litigation, which approved the Trilateral Settlement and discharged the Insurers from further obligation under the policies. It is uncontested that the defendant class of asbestos claimants in *Rudd* was properly certified under Rule 23(b)(2) on the basis of each class member's identical, inter-dependent claim to declaratory relief determining their rights under the insurance polices as potential tort victims. App. 93a n.20; *see also Continental Cas. Co. v. Rudd*, Findings of Fact ¶ 118; Conclusions of Law ¶¶ 18, 26, 36; Fibre Br. 13a-15a.

[2] Indeed, when they retreat and protest (twice) that the class "*could* have" litigated the class interest in the coverage dispute in a different class action, Class Br. 9, 28 (emphasis added), Class Counsel effectively concede that those claims were not in fact pleaded or litigated in this case, and therefore cannot serve as the basis for certification of this asbestos personal injury class action.

California state court cannot possibly fulfill the Rule 23(a) prerequisites for certification of a separate personal injury class action pending in a federal court in Texas.

In *Amchem,* the settling parties at least limited themselves to trying to bootstrap class certification on the basis of the settlement in their *own* action. But the courts below and the settling parties here have transcended the boundaries of space and time in trying to certify a class based on the pleadings and issues addressed in a separate lawsuit. If such remote extrinsic matters are sufficient to meet the requirements of Rule 23, then that rule would appear to have no limits left at all.

2. Rule 23(a)(4) Conflicts. Like the court of appeals below (*see* Pet. 14), the Respondents do not really try to demonstrate that there is no conflict within the class between future claimants and the presently injured. The Respondents concede that the Global Settlement's Trust Distribution Process (TDP) limits and allocates recovery for asbestos injuries in order to "ensure the availability of funds to pay ... the later-filed claims of exposure-only class members." Class Br. 14; Ins.Br. 13. Respondents defend the TDP's restrictions as necessary because the settlement fund "is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it." Class Br. 13. The trade-off between present and future asbestos claimants wrought by the settlement is put in stark relief by the Respondents' observation that, without the TDP's restrictions, the settlement would give currently injured class members "unlimited access to the insurance fund for their claims and the devil take the hindmost as to the rest of the class." Fibre Br. 22.

These points only confirm that, as this Court held in *Amchem*, the currently injured and exposure-only claimants have diverging interests. Pet. 13-14. Yet these groups were not separately represented here by their own sub-class plaintiffs and counsel. Respondents' frequent cries that the Global Settlement is fair "from the standpoint of the class as a whole," Fibre Br. 22, and that its benefits for the class "'overwhelmed'" and "'outweighed'" the "'divergent'" interests within the class, simply repeat the error of the court below. Ins.Br. 17, 13; Class Br. 11-13. The fairness of the settlement is the standard for approving a settlement under Rule 23(e), *not* for addressing conflicts within the class under Rule

23(a)(4). This categorical distinction "serve[s] to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248. Rule 23(a)(4) mandates "structural assurance" of fair representation for diverse interests, 117 S.Ct. at 2251, because it is concerned not with the merits of the trade-offs created by a settlement, but with whether the class representatives and class counsel *had authority to trade at all.*

In *Amchem* this Court squarely rejected the dissenting view that a discrete settlement fund in a 23(b)(3) class action empowers a court to ignore intra-class conflicts in favor of judicial oversight that can supposedly manage and reconcile the competing interests without benefit of the structural assurances of fairness provided by sub-classing. Pet. 14-15. Yet the court below embraced precisely that discredited theory in a 23(b)(1)(B) action in which the limited fund (the supposed basis for class treatment) makes the trade-offs within the settlement all the more acute. If left standing, the decision below promises to gut *Amchem*'s and Rule 23's protection of absent class members.[3]

3. Rule 23(b)(1)(B) and the Rules Enabling Act. The Respondents do not dispute that the Rules Enabling Act was a central element of this Court's GVR order to the Fifth Circuit or that the court below ignored this issue on remand. Nor do they contest that the substantive law applicable to the personal injury claims pleaded and released in this diversity class action is state law. Most important, Respondents concede that the very purpose of the class certification here pursuant to Rule 23(b)(1)(B) was to abridge those state law rights "by limiting class members' rights to obtain immediate and full payment of their individual state law claims."

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[3] Class Counsel ultimately recognize the conflict and retreat to the position that any conflict within the class does not require decertifying the entire class and vacating the approval of the settlement, but at most justifies remanding for the creation of subclasses to renegotiate the details of the TDP. Class Br. 14. But the extent to which the conflicts infected the entire Global Settlement is unknowable at this point, App. 181a, and if such an attempt to unbake the class action cake were an adequate remedy, that step would have been ordered by the Third Circuit and this Court in *Amchem*, where the very same intra-class conflict was found. Conflicts under 23(a)(4) taint the class certification *ab initio*, and the only proper course is to decertify the class and leave the parties, if they wish, to start over.

Class Br. 20.[4] No opportunity was afforded to opt out of this 23(b)(1)(B) class, so the abridgment of the absent class members' rights was compulsory. Such modification of a class member's substantive rights without his consent through application of a procedural rule is forbidden by the Rules Enabling Act.[5] The underlying substantive rights of *in rem* claimants are *already* limited by any competing claims against the same *res*. Therefore, a mandatory class action encompassing all competing claims does nothing to alter the substantive rights of class members holding only such common claims against a *preexisting* limited fund. By contrast, outside of bankruptcy, the substantive law does not allow courts to limit individual plaintiffs' independent, *in personam* recoveries in order to ensure that money will be left for later-suing persons. Here there was no receivership, no bankruptcy, no preexisting *res* or limited fund to restrict the class members' right to collect the entirety of any tort judgment against Fibreboard. Here the "limited" fund was merely an artifact of the settling parties' negotiating postures.[6]

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[4] It is hornbook law that the "first and most obvious consequence of a judgment" is that it immediately "confers upon the successful party the right to issue execution or other process of the court for its enforcement." *Clarke v. Brown*, 244 A.2d 514, 518 (N.J. Super. 1968). As Justice Scalia has noted, this familiar common law rule sometimes results in a race to the courthouse that, unremarkably, leaves later judgment creditors empty-handed. Pet. 16. If Respondents prefer a different rule, they can resort to bankruptcy or seek legislative relief from Congress.

[5] Moreover, the abridgment of personal injury claims through a federal rule goes beyond federalism to implicate due process. Hence this Court's suggestion that there is "a substantial possibility" that class actions "seeking monetary damages" cannot be certified under Rule 23(b)(1) because it permits no opt-out. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). *See* Pet. 22-25.

[6] Respondents spend a lot of time discussing the ancient distinction between law and equity, Ins.Br. 22-23, but none of their authorities provides anything remotely like precedent for limiting independent personal injury claims on the basis of the contrived "limited fund" at issue here. The cited reference to Justice Story's COMMENTARIES analyzed not *in personam* claims for money damages, but bankruptcy-like proceedings with a preexisting fixed *res*, where creditors sue to divide up the debtor's estate and "the whole administration and settlement of the estate is assumed by the court." COMMENTARIES ON EQUITY PLEADINGS, § 99 (9th ed. 1879). Respondents also cite Prof. Chaffee's discussions of suits at law involving rights held in common to a preexisting *res* (e.g., a bank in receivership,

Respondents do not deny that Congress has provided, within the bankruptcy code, special statutory relief for asbestos manufacturers overwhelmed by present and anticipated future tort liabilities, or that the courts below deliberately set out to craft a supposedly superior alternative to bankruptcy. Pet. 21 & n.11. Their only answer is that bankruptcy was not an option in this case because Fibreboard was *unwilling* to go that route. Class Br. 25; Ins.Br. 23; Fibre Br. 25. That argument, of course, proves our point: Why should Fibreboard, or any other rational actor, *ever* swallow the tough medicine of Chapter 11 if it can convince a federal court to concoct, out of a procedural rule, an end-run around bankruptcy law that resolves its tort liability while leaving all of its equity intact and safe from tort creditors?

Although the Respondents protest that the basis for class certification in this case was "not, as in *Amchem* ... a search for alternatives to the tort system," Ins.Br. 9, they nonetheless try to justify certification here by trumpeting the supposedly greater equity and efficiency of the Trust Distribution Process as compared with the "tort system" relief available to class members under the Trilateral Settlement approved in *Rudd*. Class Br. 5; Ins. Br. 10. But as this Court explained in *Amchem*:

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be

a "bankruptcy," or "a communal mill"). Z. Chaffee, SOME PROBLEMS OF EQUITY 151, 159, 285 (1950). But Prof. Chaffee acknowledged that class actions were historically limited to the *in rem* context, where "all the members are connected similarly with land or money within the jurisdiction." *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 297, 1308 (1932). "On the other hand, if the enjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence." *Id.* *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298, 311-12 (1853), involved the division of shares of existing property held in common by the members of a religious association. All of the old English cases cited by respondents likewise involved claims held in common to a preexisting *res*, such as rights under a ship's articles to a privateering prize, rights under a previous decree to tithes from parishioners, rights to shares of property under a partnership agreement, or application of a tax to an annuity arising from a commonly held trust estate.

> interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load [the settling parties] and the District Court heaped upon it.

117 S. Ct. at 2252. Here, the settling parties have heaped upon Rule 23 a load at least as crushing as that in *Amchem*. Like the alleged efficiencies of the *Amchem* settlement, the purported superiority of the TDP is powerless to justify certification of this class action.

4. Due Process Right to Opt-Out. The Respondents do not dispute that the decision below presents the same due process issue that intrigued this Court in *Adams v. Robertson*, 117 S.Ct. 1028 (1997) (per curiam), and *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (per curiam). App. 81a-85a; 119a-133a. They claim only that this case is distinguishable because affording opt-out rights here would have prejudiced Fibreboard's ability to settle its insurance coverage litigation. Ins.Br. 25; Fibre Br. 26. Whether such extrinsic factors affecting a defendant's settlement negotiations in a separate lawsuit can constitutionally justify stripping plaintiffs of their due process rights is surely a question worthy of plenary review.

5. Notice. Respondents do not contest that "class action notice sufficient under the Constitution and Rule 23" can probably never be given to "legions" who have "no perceptible asbestos-related disease at the time of the settlement" and who "may not even know of their exposure." *Amchem*, 117 S.Ct. at 2252. They answer only that such meaningless and ineffective notice is all that is required by the Constitution in a mandatory class action, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Fibre Br. 27; Ins. Br. 27-28. But *Mullane* involved a statutory state judicial procedure for pooling small preexisting trusts for administrative efficiency — a step that did not reduce any trust beneficiary's stake, 339 U.S. at 308-309 — and individual notice was easily sent to most of the beneficiaries along with their regular trust fund checks, *id.* at 318. It is a question worthy of this Court's plenary review whether *Mullane* sanctions a federal class action resolving hundreds of thousands of individual and independent future state-law personal injury claims when effective notice to a class "so unselfconscious and amorphous" is impossible. 117 S.Ct. at 2252.

6. Justiciability. The courts below openly conceded that the personal injury claims upon which jurisdiction is founded in this case

were a pretext that the parties never intended to litigate. Pet. 27. *Respondents unanimously agree*. Abandoning their own sham pleadings, the plaintiffs and defendant now say that Art. III jurisdiction and standing are predicated on the class's "interest in the outcome of an existing [insurance] coverage dispute" — "an interest [that] was pleaded in the complaint (App. 556a-559a)." Class Br. 28; Fibre Br. 28. But as explained *supra*, page 2, that "interest" was mentioned in the complaint as *background* material. It was not and could not have been *pleaded as a justiciable claim* because — as Respondents admit, Class Br. 28 — the insurance dispute was actually pleaded and litigated *not in this case*, but in the California state court case, and the fairness of the settlement of that dispute was then litigated as a declaratory judgment in *Rudd*.

Class Counsel ask this Court to pretend that this asbestos tort class action is really an insurance coverage case in disguise, insisting that "they *could have* properly litigated that interest" and "*could have* proceeded as a mandatory" class action on that issue. Class Br. 28, 29 (emphasis added). Evidently it's all the same to the Respondents, since the pleadings and this lawsuit are a charade in any event. But the legal claims that founded jurisdiction in *Rudd* to adjudicate the rights of the class against the Insurers simply cannot provide jurisdiction here to resolve the personal injury tort claims that the class holds against Fibreboard.[7]

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[7] Class Counsel suggest that this Court can cure their failure to allege genuine, justiciable claims by "deem[ing] the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings," pursuant to Fed.R.Civ.P. 15(b) and 28 U.S.C. § 1653. Class Br. 29. That is absurd. (1) Respondents' problem is not that, by some oversight, they carelessly pleaded a "defective allegation of jurisdiction," § 1653. The problem is that the pleadings were a sham and this is a feigned case. (2) The coverage dispute that they say they "could have" pleaded and then litigated at the fairness hearing was *not* in fact litigated at that hearing, so there is nothing to which the defective complaint can be "conformed." Indeed, the very purpose of that proceeding (and of the Global Settlement itself) was to *avoid* a judicial decision on the coverage issues. (3) Even if this Court were to pretend that the hypothetical claims involving the class interest *in favor* of insurance coverage for Fibreboard had been alleged and proven, those claims would not enable the class to seek approval of the Global Settlement, because that settlement extinguishes entirely *different* claims — namely, the class members' individual personal injury claims *against Fibreboard*. *See* Pet. 12 n. 6.

The Respondents contend that the justiciability of collusive settlements was resolved long ago by cases like *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), Ins.Br. 28-29 & n.*; Fibre Br. 28. But as Justice Kennedy pointed out during argument in *Amchem*, those consent-decree cases involved an actual contemplated lawsuit and "an imminent litigable dispute" that would have transpired if the consent decree were not issued, Tr. Oral Arg. 32, whereas here *it is undisputed that the class never had any intention of litigating the class complaint, which was filed solely to provide the district court with a jurisdictional hook*. App. 52a.[8] Worse still, this farce was staged by the district court, Pet. 27-28 — a fact that the Respondents do not even try to dispute.

Ultimately, Respondents retreat to the desperate plea that this case *must somehow* constitute a justiciable controversy because it "resulted in a massive transfer of wealth from two insurers to a trust" set up to resolve tort claims. Fibre Br. 28. This confuses the size of government action with its form: Congress routinely appropriates billions to programs designed to provide relief to individuals, but its actions are still legislative — just like the settlement at issue here.

7. Respondents' Appeal to Practical Necessity. Respondents plead with the Court to preserve the Global Settlement as necessary to protect class members from losing their only chance at recovery against Fibreboard, because supposedly there would not have been any resolution of the insurance dispute absent the Global Settlement. That claim is both irrelevant and inaccurate. The peculiarities of the bargaining process between private parties plainly cannot give a federal court authority under Rule 23, the Rules Enabling Act, due process or Art. III to alter the substantive rights of class members or to exercise jurisdiction in a feigned case.

In any event, Respondents' assertion is belied by the express

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[8] If the defendants in those cases had not consented to the judicial approval of the decrees, the parties would have gone back to litigating against each other, because those cases involved continuing conflict over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift*, 276 U.S. at 326; *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984). The Chief Justice and Justice Scalia suggested in *Amchem* that the consent-decree cases may also be distinguishable because they were all government agency cases that preserved the rights of individuals injured by the defendant's conduct. Tr. Oral Arg. 27. *See, e.g., Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976).

terms of the Trilateral Settlement, which provides that it is independent and will be in force precisely if and when the Global Settlement has been *invalidated* and when Fibreboard therefore continues to be subject to asbestos claims in the tort system. App. 51a. If the Global Settlement fails, the insurers will pay Fibreboard $2 billion, which Fibreboard can then use — in addition to its own assets (valued at $515 million in its recent acquisition by Owens-Corning, Pet. 2 n.1) — to pay future and present unresolved asbestos-related claims. Furthermore, the Trilateral Settlement provides another $1.5 billion to pay Fibreboard's *past*, unpaid settlement obligations. Fibreboard's own counsel testified that the Trilateral Settlement was worth $3.35 billion. Tr. 604. The district court never found that the coverage dispute would not have settled but for the Global Settlement. It found (App. 279a-80a) that, as Fibreboard itself testified, Continental and Fibreboard were unable to reach a bilateral settlement of the coverage case in 1993 *only* because (i) CNA's offer was not high enough, and (ii) CNA wanted Pacific to contribute. The Global Settlement was not necessary to overcome either stumbling block.[9]

CONCLUSION

The petition should be granted and the decision below should either be summarily reversed (on the basis of the Fifth Circuit's refusal to apply *Amchem*'s holdings on Rule 23(a) certification and 23(a)(4) conflicts), or the case should be set for plenary review of those issues and of the dangerous precedent set by the Fifth Circuit on the issues of notice, justiciability, opt-out rights and the application of Rule 23(b)(1)(B).

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[9] Indeed, at the fairness hearing Fibreboard's counsel expressly *denied* that it was necessary to limit or extinguish the plaintiffs' asbestos claims against Fibreboard in order to settle the insurance dispute — the problem was the Insurers were not then willing to write "a big enough check." Appendix hereto 1a. He testified that, just a month prior to reaching the Global Settlement, Fibreboard had been willing to accept a $3.2 billion coverage settlement that would not have affected plaintiffs' tort claims at all, and that would have paid Fibreboard $150 million *less* than it ultimately received in the Trilateral Settlement. *Id.* Thus the restrictions on plaintiffs' tort claims in the Global Settlement are, by Fibreboard's own sworn testimony, entirely gratuitous.

Respectfully submitted,

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APPENDIX

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

TESTIMONY OF STEPHEN M. SNYDER, Esq., Counsel for Fibreboard Corporation

[Commencing at page 592 of the Joint Appendix in the Fifth Circuit:]

Q: [W]ould you agree with me, then, that it would have been impossible under that agreement for Continental to have settled their coverage in a way that would not have let — would not have extinguished all of the asbestos liabilities of Fibreboard?

A: No, that's not true at all.

Q: What would have been the circumstances where that could have happened?

A: I believe we had negotiations with them in 1993 whereby if they had written a big enough check we would have done just that.

Q: Okay.

A: Just didn't work, that's all.

[Commencing at page 605 of the Joint Appendix in the Fifth Circuit:]

Q: So you would have been willing to enter into a bilateral settlement with Continental in July [1993] for a little over $3 billion, a little over a hundred or two hundred million over $3 billion?

A: 3.2 or something like that.